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# In the Supreme Court of the United States

OCTOBER TERM, 1944.

No. 38.

THE HOOVEN & ALLISON CO.,  
An Ohio corporation,  
*Petitioner,*

vs.

WILLIAM S. EVATT,  
Tax Commissioner of Ohio,  
*Respondent.*

## BRIEF OF PETITIONER.

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## INDEX.

Writ of Certiorari Granted .....	1
Opinions Below .....	1
I. Statement of the Case .....	1
A. The Case Below .....	1
B. Facts .....	2
II. Specifications of Error .....	10
III. Summary of Argument .....	11
IV. Argument .....	12
A. Applicable Constitutional Provision .....	12
B. The Original Package Doctrine—With Refer- ence to Imports .....	13
C. Analysis of the Decision of the Ohio Supreme Court Upholding the Tax .....	18
D. The Petitioner Was the Importer of the Goods in Question .....	18
E. The Term Imports Comprehends Goods Brought Into the United States Both for Purposes (a) of Sale, and (b) of Manufac- turing or Processing Before Sale .....	35
F. Articles Brought Into This Country From the Philippine Islands Are Imports Within Article I, Section 10, Clause 2 of the Constitu- tion .....	38
1. Fibers Brought into this Country from Abroad Constitute Imports within the Con- stitutional Provision .....	38
2. In Any Event, Shipments to the Petitioner from the Philippine Islands Are within the "Original Package" Doctrine .....	41
a. Legislative Background of Philippine Commerce .....	45

b. The Philippine Independence Act of 1933 .....	50
c. Relation of Philippine Islands to State of Ohio .....	53
Conclusion .....	55
APPENDIX—Constitutional and Statutory Provisions .....	57

## TABLE OF AUTHORITIES.

### Cases

<i>American Steel and Wire Company v. Speed</i> , 192 U. S. 500 (1904) .....	17
<i>Anglo-Chilean Nitrate Sales Corporation v. State of Alabama</i> , 288 U. S. 218 (1933) .....	13
<i>Atlanta Coast Line Railroad Company v. Standard Oil Company of Kentucky</i> , 275 U. S. 257 (1927) .....	20
<i>Balzac v. Porto Rico</i> , 258 U. S. 298 (1922) .....	49
<i>Bank of United States v. Daniel</i> , 12 Pet. (37 U. S.) 32 (1838) .....	53
<i>Blum v. Caddo</i> , 3 Fed. Cas. 753 (C. C. D., La. 1870) .....	31
<i>Booth Fisheries Corporation v. Case</i> , 182 Wash. 392, 47 P. (2d) 834 (1935) .....	41
<i>Bradford v. Chase National Bank</i> , 24 Fed. Supp. 28 (1938); 105 F. 2d 1901 (C. C. A. 2, 1939); 309 U. S. 632 (1939) .....	51
<i>Brown v. Maryland</i> , 12 Wheat. (25 U. S.) 419 (1827) .....	13, 15, 16, 24, 36, 38, 54
<i>Buckner v. Finley &amp; Van Lear</i> , 2 Pet. (27 U. S.) 586 (1829) .....	53
<i>Burke v. Davis</i> , 63 Fed. 456 (C. C. N. D. Ill., 1894) .....	27
<i>Burke v. Wells</i> , 208 U. S. 14 (1908) .....	17
<i>California Ins. Co. v. Union Compress Co.</i> , 133 U. S. 387 (1890) .....	23

<i>Cincinnati Soap Company v. United States</i> , 301 U. S. 308 (1937) .....	41, 50
<i>City of Detroit v. Lake Superior Paper Company</i> , 202 Mich. 22, 167 N. W. 852 (1918) .....	13
<i>City of Galveston v. Mexican Petroleum Corporation</i> , 15 F. (2d) 208 (D. C. S. D. Tex. 1926) .....	13
<i>Cook v. Pennsylvania</i> , 97 U. S. 566 (1878) .....	13
<i>Coombes v. Getz</i> , 285 U. S. 434 (1932) .....	19
<i>Crew Levick Company v. Pennsylvania</i> , 245 U. S. 292 (1917) .....	21
<i>Davis v. Wechsler</i> , 263 U. S. 22 (1923) .....	19
<i>De Lima v. Bidwell</i> , 182 U. S. 1 (1901) .....	43, 44
<i>Detroit United Ry. Co. v. City of Detroit</i> , 242 U. S. 238 (1916) .....	19
<i>Diamond Rings, Case of the (Fourteen Diamond Rings v. United States)</i> , 183 U. S. 176, 1901) .....	42, 43, 44
<i>Dorr v. U. S.</i> , 195 U. S. 138 (1904) .....	44
<i>Dove, J. W. &amp; Co., In Re Appeal of</i> , 197 Ill. 376, 64 N. E. 377 (1902) .....	13
<i>Downes v. Bidwell</i> , 182 U. S. 244 (1901) .....	43, 44, 49
<i>Fleming v. Page</i> , 9 How. (50 U. S.) 603 (1849) .....	50
<i>Gulf Fisheries Co. v. Darrouzet</i> , 17 F. (2d) 374, 376 (1926) .....	41
<i>Gulf Fisheries Company v. MacInerney</i> , 276 U. S. 124 (1928) .....	13, 36, 41
<i>Hamersley Mfg. Co. v. Erie Railroad Company</i> , 148 I. C. C. Rep. 47 (1928); reversed <i>sub nom. Erie R. R. Co. v. United States</i> , 32 F. (2d) 613 (D. C. S. D. N. J., 1929) decision of district court reversed and Interstate Commerce Commission affirmed in <i>United States v. Erie Railroad Company</i> , 280 U. S. 98 (1929) .....	28
<i>Imperial Development Co. v. City of Calexico</i> , 47 Cal. App. 666, 191 Pac. 50 (1920) .....	13

<i>License Cases</i> , 5 How. (46 U. S.) 504 (1846) .....	15
<i>Low v. Austin</i> , 80 U. S. 29 (1871) .....	13, 16, 20, 26, 35, 36
<i>May and Company v. New Orleans</i> , 178 U. S. 496 (1900) .....	13
<i>McGoldrick v. Gulf Oil Corporation</i> , 309 U. S. 414 (1940) .....	13, 37
<i>Merrimack, The</i> , 8 Cranch (12 U. S.) 317 (1814) .....	30
<i>Mexican Petroleum Corporation v. City of South Port- land</i> , 121 Me. 128, 115 Atl. 900 (1922) .....	13
<i>Mexican Petroleum Corporation of Louisiana Tax Commission</i> , 173 La. 604, 138 So. 117 (1931) .....	13, 37
<i>Norfolk and Western Railway Company v. Sims</i> , 191 U. S. 441 (1903) .....	13, 27
<i>Odessa, The</i> [1916], 1 A. C. 145 .....	31
<i>Patapsco Guano Company v. Board of Agriculture</i> , 171 U. S. 345 (1898) .....	39
<i>Pitkin, In re Appeal of</i> , 193 Ill. 268, 61 N. E. 1048 (901) .....	13
<i>Pittsburgh and Southern Coal Company v. Louisiana</i> , 156 U. S. 590 (1895) .....	39
<i>Price v. Baum</i> , 71 Ohio App. 160, 48 N. E. (2d) 123 (1942) .....	33
<i>Railroad Commission of Louisiana v. Texas and Pacific Railroad Company</i> , 229 U. S. 336 (1913) .....	19
<i>Rearick v. Pennsylvania</i> , 203 U. S. 507 (1906) .....	55
<i>Robinson and Martin v. Houston and T. C. Railway Company</i> , 105 Tex. 185, 146 S. W. 537 (1912) .....	32
<i>Sonneborn Bros. v. Cureton</i> , 262 U. S. 506 (1923) .....	17
<i>Southern Pacific Railway Company v. City of Caléxico</i> , 288 Fed. 634 (D. C. S. D. Cal. 1923) .....	13
<i>Spalding &amp; Bros. v. Edwards</i> , 262 U. S. 66 (1923) .....	18
<i>Standard Casing Company, Inc. v. California Casing Company, Inc.</i> , 233 N. Y. 413, 135 N. E. 834 (1922) .....	29, 32

<i>State v. Davis</i> , 67 N. J. L. 88, 50 Atl. 586 (1901).....	13
<i>State v. Fidelity &amp; Deposit Co. of Maryland</i> , 194 Wash. 591, 78 P. (2d) 1090 (1938).....	26
<i>State ex rel. Gelpi and Bros. v. Board of Assessors</i> , 46 La. Ann. Rep. 145, 15 So. 10 (1894) .....	13
<i>Texas v. White</i> , 7 Wall. (74 U. S.) 700 (1868).....	41
<i>Tres Ritos Ranch Co. v. Abbott</i> , 44 N. M. 556, 105 P. (2d) 1070 (1940).....	13
<i>United States v. Andrews</i> , 207 U. S. 229 (1907)... 21, 27, 30	
<i>United States v. Bishop</i> , 125 Fed. 181 (C. C. A. 8, 1903)	27
<i>United States v. Butler</i> , 297 U. S. 1 (1936).....	50
<i>United States v. Erie Railroad Company</i> , 280 U. S. 98 (1929) .....	22
<i>United States v. Mexican International Railroad Com- pany</i> , 151 Fed. 545 (C. C. A. 5, 1907).....	27
<i>United States v. West India Oil Co. v. Damenech</i> , 311 U. S. 20 (1940).....	44
<i>Van Leunan Co. v. Meddock</i> , 16 Ohio App. 309 (1922), motion to certify to Supreme Court of Ohio over- ruled, 20 Ohio L. Rep. 412 (1922).....	29-30, 33
<i>Waring v. Mayor of Mobile</i> , 8 Wall., (75 U. S.) 110 (1868) .....	13, 20, 24, 26, 28, 29, 35, 36
<i>Woodruff v. Parham</i> , 8 Wall. (75 U. S.) 123 (1868) ..	17, 39

### **Constitutional Provisions:**

#### **Constitution of the United States:**

Article I, Section 8, Clause 2 .....	44
Article I, Section 8, Clause 3.....	53, 54
Article I, Section 10, Clause 2 .....	
..... 2, 10, 11, 12, 38, 39, 40, 42, 44, 48, 53, 54, 55, 57	

## Statutes.

5 Code of Fed. Reg. ( <i>Customs Regulations</i> ), Tit. 19, § 5.2 .....	47
5 Code of Federal Regulations, Title 19, §§ 6.1, 6.8...	27
Customs Regulations of 1923, Arts. 257, 258 .....	27
House Documents, No. 400, 74th Cong., 2d. Sess .....	51
Ohio General Code:	
Section 5371 .....	57
Section 5378 .....	58
Section 5611-2 .....	2
Philippine Independence Act (48 Stat. 456, c. 84) ....	41
Tariff Act of July 24, 1897, 30 Stat. 151 .....	43, 44
Treaty of Paris (1898-1899) .....	41, 43
U. S. C., Tit. 7, § 608a; 48 Stat. 672; 49 Stat. 762; 50 Stat. 247 .....	46
U. S. C., Tit. 10, § 540; 44 Stat. 565; 49 Stat. 218; 56 Stat. 763 .....	8
U. S. C., Tit. 15, § 12; 38 Stat. 730 .....	48
U. S. C., Tit. 19, § 577; 32 Stat. 55 .....	47
U. S. C., Tit. 19, § 1301; 46 Stat. 685 .....	47
U. S. C., Tit. 48, § 1042; 39 Stat. 548 .....	46
U. S. C., Tit. 48, §§ 1142 <i>et seq.</i> ; 32 Stat. 952 .....	48
U. S. C., Tit. 48, § 1235; 47 Stat. 764; 48 Stat. 459 .....	51
U. S. C., Tit. 48, § 1236; 47 Stat. 764; 48 Stat. 459 .....	48
U. S. C., Tit. 48, § 1236a; 47 Stat. 765; 48 Stat. 460 .....	45
U. S. C., Tit. 48, § 1236c; 55 Stat. 852 .....	45
U. S. C., Tit. 48, § 1236(e); 47 Stat. 764; 48 Stat. 459 .....	45
U. S. C., Tit. 48, § 1238; 47 Stat. 768; 48 Stat. 463 .....	47, 48

## Texts and Articles.

<i>Bogert, Economic History of the United States</i> , (1938), 174-179 .....	36
<i>Export and Import Practice</i> (United States Department of Commerce, Trade Promotion Series—No. 175, 1938) at p. 162.....	20
3, <i>Farrand, Records of the Federal Convention</i> (1911), p. 172 at 215.....	15
<i>Fisher, The Status of the Philippine Islands under the Independence Act</i> , 19 American Bar Association Journal 465 (1933).....	40
<i>Langdell, The Status of Our New Territories</i> , 12 Harv. L. Rev., 365, 371 (1899).....	40
<i>Littlefield, The Insular Cases</i> , 15 Harv. L. Rev. 169, 281 (1901) .....	40
<i>Thayer, The Insular Tariff Cases in the Supreme Court</i> , 15 Harv. L. Rev. 164 (1901).....	40
<i>Thayer, Our New Possessions</i> , 12 Harv. L. Rev. 464 (1899) .....	40



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*Petitioner,*

vs.

WILLIAM S. EVATT,  
Tax Commissioner of Ohio,  
*Respondent.*

## BRIEF OF PETITIONER.

A petition for a writ of certiorari directed to the Supreme Court of Ohio was granted by this Court on April 10, 1944, 321 U. S. 762.

### OPINIONS BELOW.

The opinion of the Board of Tax Appeals of Ohio is reported unofficially in 26 Ohio Ops. 25 (1943); that of the Supreme Court of Ohio is reported officially in 142 O. S. 235, 51 N. E. (2d) 723 (1943). These opinions are reprinted in the record at pages 94 and 104 respectively.

### I.

#### STATEMENT OF THE CASE.

##### A. The Case Below.

In its Ohio personal property tax returns for the years 1938, 1939 and 1940, The Hooven & Allison Co., petitioner, omitted from its inventory the value of certain fibers on the ground that they were imports still in the original package, unused for any purpose, and consequently im-

mune from taxation by the State of Ohio under Article I, Section 10, Clause 2 of the Constitution of the United States. The respondent, Tax Commissioner of Ohio, however, decided that these fibers were subject to state taxation and assessed them for the years in question by his assessment certificates of valuation and distribution dated July 3, 1941 (R. 4A, 4B, 4C), adding their value to petitioner's taxable inventory.<sup>1</sup> Petitioner then applied to the respondent for a review and redetermination which application was denied (R. 2). Petitioner thereafter, on July 31, 1941, filed its notice of appeal with the Board of Tax Appeals, pursuant to Ohio General Code, Section 5611 (R. 1). After hearing, by its order dated March 19, 1943 the Board of Tax Appeals sustained the respondent's action (R. 90), with opinion (R. 94). On April 13, 1943 petitioner filed its notice of appeal to the Supreme Court of Ohio pursuant to Ohio General Code, Section 5611-2. The Supreme Court of Ohio, one judge dissenting, affirmed the decision of the Board of Tax Appeals, thus holding the fibers taxable.<sup>2</sup> (142 O. S. 235, 51 N. E. (2d) 723 (1943)); (R. 104). This Court thereupon granted certiorari. (321 U. S. 762 (1944).)

### **B. Facts.**

The facts of the case are shown by the amended assessment certificates of valuation and distribution (R. 4A, 4B, 4C), notice of final determination (R. 2), notice of appeal (R. 1), and the transcript of proceedings, stipulations of the parties and the undisputed testimony of plaintiff's witnesses (R. 33, 38-39). The State of Ohio introduced no evidence. The petitioner's evidence consisted of the

<sup>1</sup> Those portions of the applicable statutes are set out in the appendix, pages 57-59.

<sup>2</sup> Ohio General Code, Section 5611-2 provides for an appeal to the Supreme Court of Ohio to obtain a reversal, vacation or modification of a decision of the Board of Tax Appeals.

oral testimony of one witness and two stipulations containing four exhibits (R. 38-63 and 63-89). The statements set forth in the stipulations are admitted to be true (R. 63).

The facts are as follows: petitioner is a corporation organized under the laws of the State of Ohio in 1888, with its principal place of business at Xenia, Ohio (R. 38). It is engaged generally in the business of manufacturing rope, twine, packing and oakum binder and similar products. The principal raw materials used in its manufacturing operations are fibers consisting of manila hemp from the Philippine Islands, Java sisal from the Dutch East Indies, African sisal from British and Portuguese East Africa, Mauritius hemp from the Island of Mauritius, jute from India, soft hemp from Italy, the Balkan States and South America; domestic binders, sisal and henequen from Cuba and Mexico; and istle from Cuba (R. 39). None of the fibers sought to be taxed in this case come from sources within the continental United States (R. 39, 55). It is not questioned that, with the exception of the Philippine Islands, the countries from which all these fibers came are foreign countries.

The course of business by which raw material is obtained is as follows: petitioner buys substantially all its fiber from foreign producers represented by five different brokers who have their offices in the City of New York (R. 39, 63-88B). These brokers frequently make offers of sale of fibers to petitioner; or, when the latter is in the market for fiber, it communicates with the brokers, usually by telegraph or telephone, infrequently by letter. When a certain grade of fiber is sought, petitioner asks the broker handling that grade for a quotation. If the price quoted is higher than petitioner is willing to pay, it makes an offer which is cabled by the broker to his principal in a foreign country; and which is usually accepted by the foreign principal. Thereupon the broker prepares and forwards

to petitioner a standard form of contract in duplicate signed by the broker as agent on behalf of his principal (R. 68, 71, 75, 84, 85). Upon receipt of the contract it is signed by petitioner and one copy is returned to the broker in New York (R. 39-40, 68, 71, 75, 81, 85). This contract covers the quantity, price, time of shipment, and frequently a designation by petitioner of the steamship company upon whose vessel the fiber is to be shipped (R. 40, 47).

There are many grades of fiber and the contracts of purchase almost invariably specify the grade and the estate from which it comes (R. 58). Frequently the fiber covered by a particular contract has not been grown when the contract is signed (R. 40). Many of the sources of fiber are in remote parts of the world and from three to six months may be required for the transit from the point of shipment to the point of destination at Xenia, Ohio (R. 42).

When the fiber is loaded on board the vessel at the point of origin, it is consigned to the broker in this country usually on order bill of lading "*notify The Hooven & Allison Company*" (the petitioner) or the broker (R. 68). Sometimes it is shipped to the broker on straight bill of lading (R. 82). Immediately upon loading a declaration is cabled to the New York broker setting forth the contract reference pursuant to which the shipment is made, the name of the vessel, the number of bales shipped, and the approximate date of arrival in the United States. The broker immediately notifies the petitioner (R. 40, 71, 77, 82, 86). This is followed, just prior to the time the fiber arrives at the port of entry, by a *pro forma* invoice which gives the approximate tonnage and value of the shipment (R. 40). Petitioner then usually gives instructions for shipping overland to Xenia. Thereafter the fiber is brought through the customs on behalf of petitioner by the broker-consignee, weighed, a final invoice made up from the weights then obtained, and shipped by rail under a straight bill of lading to Xenia, Ohio (R. 40), where it is

delivered by the carrier to petitioner, who pays the freight (R. 41, 59). Later, within ten or fifteen days after receipt of the final invoice, the purchase price is paid (R. 42).

At the time the fiber is loaded on board ship in a foreign port it is earmarked for petitioner (R. 40) in such a way as to show that the shipment is allocated to and made to fulfill the requirements of a particular contract. Neither a beneficial property interest in nor a power of disposition over the goods to secure the payment of the price is in practice reserved by the seller, either by the form of the bill of lading or otherwise, since sales to petitioner are, as heretofore stated, credit sales (R. 41, 42, 52, 53, 69, 73, 78). The respondent stipulates that these are credit sales (Stipulation, R. 63, 72, 82, 86).

The price the petitioner paid during the years in question for the goods is known as a "landed price,"—one which includes as its stated component elements the cost of fiber at the point of origin, normal ocean freight charges, insurance, clearance through the customs, and the expense of arrangement for transshipment to Xenia, Ohio (R. 41, 58, 59, 61, 78-79). This has most of the earmarks of a c.i.f. sale; although not so designated by name (R. 61). No import duty is imposed on any of the fibers except true hemp (R. 41), and in that case, petitioner always pays the duty as an element of the purchase price (R. 41). Any variance beyond the normal cost of freight, insurance, or any other element going to make up the purchase price is for the petitioner's account (R. 58-59).

Three types of insurance are provided for in the various forms of contracts involved: the usual marine insurance, war risk insurance and extra value insurance. The premiums for the marine insurance are paid by the petitioner, either directly or as an element of the purchase price. The same is true for the war risk insurance except a small percentage of the premium which is assumed by the seller (R. 83, 41, 69, 72, 78). The premium for extra value

insurance is always paid by petitioner and it is taken out at his request. In case of loss it is the beneficiary and is thus insured against loss of the goods on a rising market. If a loss should occur, the difference between the contract price and the increased value at which the goods are insured under the extra value insurance would be paid to Hooven and Allison after the claim is collected from the insurance underwriters (R. 78). The beneficiary of the marine and war risk insurance varies somewhat. In some instances it is payable to the foreign principal or the local agent, as their interests may appear (R. 72). In other instances it is payable to the local agent because, to facilitate the sale of the fibers, he had opened credits in favor of the seller (R. 69). In still others it is payable to the foreign principal, the local agent, if he has opened credits for the foreign principal, or to the negotiating bank, as the interests of the various parties may appear (R. 78, 79).

Petitioner does not pay the New York brokers, with whom it deals in purchasing fiber, any compensation for the services they render in clearing the fiber through the customs, for having it weighed, or for arranging its transshipment by rail to Xenia, Ohio, since it is understood that the cost of such services is included in the contract price (R. 62), and the contract is made with the understanding that these services will be performed by these agents.

When the fibers reach Xenia, Ohio, they are delivered to petitioner, placed in its raw-material warehouses and held there until needed in its manufacturing operations (R. 42). While in the warehouses the fiber remains in the original packages in which it is received from abroad, i.e., in bales ranging from 200 to 1,000 pounds in weight, which are sometimes covered with reed and bound with steel bands, and sometimes merely bound without a covering (R. 43). It is not disputed that these bales constitute original packages (R. 89).

While the bales remain in the raw-material warehouses they are carried in a raw-material account on petitioner's books (R. 42, 43); but upon their removal from such warehouses they are immediately charged to the goods-in-process account, whether the bales have been broken or not (R. 43). Petitioner makes no use whatever of the bales of fiber while they remain in the raw-material warehouses (R. 45). Some of the fibers are used immediately upon receipt, some are stored for three to six months. Petitioner keeps a minimum working inventory (R. 42).

Three buildings are used by petitioner as raw-material warehouses, in two of which only fiber in the original packages is stored. In the third, both raw material and finished goods are stored, but they are kept in separate rooms (R. 49, 50).

Petitioner rarely makes a spot purchase, i.e., a purchase of fiber which is in the United States at the date of purchase, less than one-tenth of one per cent of its usual inventory ever having been purchased in that manner (R. 50). No fibers so purchased are involved in this case (R. 53).

While the fiber contracts provide that equivalent delivery may be made from ship or store at seller's option, that payment is to be made in New York funds on delivery on dock at destination, and that title is to remain in the seller until the goods are fully paid for, the invariable practice, business custom and usage between sellers and petitioner is to disregard these terms (R. 72, 74A, 78, 83, 84, 84A, 87, 88A). Consequently petitioner has never received a delivery of fiber from stock on hand in the United States (R. 53); has not, for at least twenty-seven years including the transactions involved in the taxable years here in question, paid the price of the goods until after they have been delivered to it at Xenia, Ohio (R. 42, 45); and the sellers have never in actual practice reserved any security interest in or power of disposition over the goods

when they are shipped, either by the form of the bill of lading or otherwise (R. 41, 61, 69, 82, 86). The forms of these contracts have been standardized and in use for many years (R. 63, 83).

Petitioner has never rejected a shipment of fiber, even though it makes no inspection at the port of entry. Should a shipment be found to be inferior upon inspection at Xenia, Ohio, petitioner would accept it and file a claim against the seller; and if such claim were not adjusted to its satisfaction, the matter would be referred to arbitration pursuant to a clause in the sales contract (R. 60).

The course of business herein described was the regular course of business of petitioner and its suppliers during the years now under consideration and for a long time prior thereto. It is the usual course of business of the industry in which it is engaged (R. 53).

By stipulation of the parties it is agreed that the fibers added to the inventory of the petitioner by the respondent and upon which the tax in controversy is based come from the following sources and have the value set forth as follows (R. 89):

Year	Source	Value
1938	Countries other than the Philippine Islands .....	\$410,030
1938	Philippine Islands .....	57,500
	. . . . .	
1939	Countries other than the Philippine Islands .....	225,080
1939	Philippine Islands .....	49,750
	. . . . .	
1940	Countries other than the Philippine Islands .....	191,990
1940	Philippine Islands .....	29,800

Certain questions were propounded by interrogatories to the brokers acting as agents for the foreign principals who were the sellers of the fibers involved in this case. It

was stipulated by the parties hereto that the statements made by these brokers "may be considered as true for the purposes of this action, . . .," with the reservation of the right to both parties to object to anything contained therein on the ground of relevancy or competency, and the right to proffer additional testimony if desired (R. 63-64, 67). No question is now before this Court as to the relevancy and competency of this evidence. Hence all statements stand as true for the purposes of this case.

In answer to these interrogatories, R. L. Pritchard of R. L. Pritchard & Company stated that after the "goods are shipped from the foreign port and the documents are handed to the negotiating bank at the port of origin, foreign shipper does not reserve any power of disposition over the goods" (R. 69). M. S. Rosenthal, Vice President of Stein, Hall and Company, Inc., stated that when sisal is shipped "the goods are entirely at the risk of the buyer from the date they are loaded on to the vessel at port of shipment, and subsequent delivery to the buyer is contingent upon the safe and sound arrival of the goods" (R. 77). James Fyfe, another broker, stated that the seller could not divert the shipment at any time after the goods are loaded on board ship for the simple reason that they are already shipped for Messrs. Hooven and Allison under a specified contract and that the seller has no power of disposition over the goods either in the marine bill of lading or in the railroad bill of lading (R. 82). William Knight, representing Hanson and Orth, testified to the same effect (R. 86).

All brokers testified that in their opinion petitioner was the importer (R. 70, 73, 78-79, 84, 87).

The entire course of business and the basis of these opinions is aptly summarized by William Knight of Hanson and Orth Company who stated: "Viewing the entire course of these business transactions, in my opinion Hooven and Allison should be considered as the real importers, for

I believe that the fundamental consideration is the fact that certain identifiable parcels of fibers are shipped from foreign countries specifically for Hooven and Allison and brought into this country on their order and for their use" (R. 87).

The state introduced no testimony whatever in this case. There is no conflicting evidence. That the fibers, except possibly those coming from the Philippine Islands, are imports is not questioned. That they were in the original package and unused by the petitioner when the respondent sought to assess the tax in dispute does not seem questionable.

The only questions before this Court are (1) whether petitioner was the importer, (2) whether these fibers had lost their character as imports when assessed for state property taxation, and (3) whether the fibers brought in from the Philippine Islands were ever imports, all within the purview of the imports clause of the Constitution.

## II.

### **SPECIFICATIONS OF ERROR.**

The Supreme Court of Ohio erred:

1. In failing to hold that petitioner was the importer of the fibers within the purview of Article I, Section 10, Clause 2 of the Constitution of the United States;

2. In holding that,—assuming petitioner was the importer,—the fibers had lost their immunity from state property taxation and had become commingled "with the general mass of property in this country"; and in sustaining the power of the State of Ohio to impose a general property tax thereon while they remained unused by petitioner in its warehouses in the original packages in which they were imported, notwithstanding the limitation upon such state taxing power contained in Article I, Section 10, Clause 2 of the Constitution; and

3. In failing to hold that the fibers brought into the United States from the Philippine Islands were imports within the meaning of that term as used in Article I, Section 10, Clause 2 of the Constitution of the United States.

### III.

#### SUMMARY OF ARGUMENT.

1. In the absence of congressional waiver, imports as such carry a constitutional immunity from state taxation while they are retained by the importer in the original form or package in which received and such immunity continues until he has (a) sold the goods, or (b) so acted upon them by manufacturing or processing as to change their form from that which they possessed at the time of importation.

2. The importer within the purview of Article I, Section 10, Clause 2 of the Constitution is the person upon whom rests the risk of loss at the moment when the article imported is brought into this country:

3. In determining constitutional rights the entire group of facts involved must be considered, and the mere form of a contract or bill of lading standing alone is not determinative thereof. Such documents must be considered as a portion of the whole group of facts in the case.

4. The fibres involved in this case were brought into this country only because of orders originally given to the foreign principals through their local agents. When the contracts were made some of the fibres were ascertained but some were not even in existence. When loaded on ships in ports of foreign countries they were earmarked for petitioner and by appropriate marking allocated to fulfill the specific contracts between petitioner and the foreign sellers; and risk of loss was upon the petitioner from that moment. Petitioner was, therefore, upon the undisputed facts of record, the importer within the meaning of the import clause of the Constitution. The sales of the fibres.

took place when the goods were appropriated to the contracts and shipped from the foreign ports.

5. Beneficial title to the fibres passed to the petitioner at the time they were appropriated to the various contracts in the foreign ports of origin or at the latest when they were loaded on the steamships in the foreign ports to begin their journey to the United States.

6. The fibres, having been imported by petitioner for the purpose of manufacture and then sale, were immune from state property taxation while held by the petitioner in the same form as that in which they were brought into this country and not sold by it or used in its manufacturing processes.

7. Even though the fibres were brought in for the purpose first of manufacturing or processing and then of sale of the finished goods, they are, nevertheless, immune from state property taxation while remaining in the petitioner's hands in the original package until such time at least as they are first used in manufacturing operations.

8. Fibres coming from the Philippine Islands are imports within the meaning of the import clause of Article I, Section 10, Clause 2 of the Constitution.

#### IV.

#### ARGUMENT.

##### A. Applicable Constitutional Provision.

Article I, Section 10, Clause 2 of the Constitution of the United States in so far as applicable to the case at bar, provides:

"No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports . . ."

## B. The Original Package Doctrine—With Reference To Imports.

In *Brown v. Maryland*, 12 Wheat. 419 (1827),<sup>3</sup> a statute of Maryland required all importers of foreign goods, by bale or package, and other persons selling such goods by wholesale, by bale or package, before they were authorized to sell, to take out a license from the state, paying a fifty-dollar license fee therefor. Refusal or neglect to take out such license subjected the vendor to certain penalties. Brown sold a bale of foreign dry goods in Maryland without having taken out such license, was indicted and a penalty was assessed against him. This judgment was affirmed in the Court of Appeals of Maryland and the case came to this Court on writ of error. Brown argued the inva-

<sup>3</sup> "The case (*Brown v. Maryland*) is one of the most important ever decided by this court, and has been adhered to by a uniform series of decisions since that time." *Norfolk and Western Railway Company v. Sims*, 191 U. S. 441, 449 (1903). *Brown v. Maryland* has had a long continuous history and life. It has been recognized and applied in the following import cases among others: *Low v. Austin*, 80 U. S. 29 (1871); *Waring v. Mayor of Mobile*, 75 U. S. (8 Wall. 110) (1868); *Cook v. Pennsylvania*, 97 U. S. 566 (1878); *May and Company v. New Orleans*, 178 U. S. 496 (1900); *Anglo-Chilean Nitrate Sales Corporation v. State of Alabama*, 288 U. S. 218 (1933), noted in (1933) 46 Harv. L. Rev. 1024 (1933), 42 Yale L. J. 963; *McGoldrick v. Gulf Refining Company*, 309 U. S. 414 (1940); *Gulf Fisheries Company v. MacInerney*, 276 U. S. 124 (1928); *State ex rel. Gelpi and Bros. v. Board of Assessors*, 46 La. Ann. Rep. 145, 15 So. 10 (1894); *City of Detroit v. Lake Superior Paper Company*, 202 Mich. 22, 167 N. W. 852 (1918); *State v. Davis*, 67 N. J. L. 88, 50 Atl. 586 (1901); *In re Appeal of Pitkin*, 193 Ill. 268, 61 N. E. 1048 (1901); *In Re Appeal of J. W. Dove & Co.*, 197 Ill. 376, 64 N. E. 377 (1902); *Mexican Petroleum Corporation v. City of South Portland*, 121 Me. 128, 115 Atl. 900 (1922), criticized in *City of Galveston v. Mexican Petroleum Corporation*, 15 F. (2d) 208 (D. C. S. D. Tex. 1926), noted in (1927) 11 Minn. L. Rev. 368; *Mexican Petroleum Corporation v. Louisiana Tax Commission*, 173 La. 604, 138 So. 117 (1931), noted 80 U. of Pa. L. Rev. 592 (1932); *Southern Pacific Railway Company v. City of Calexico*, 288 Fed. 634 (D. C. S. D. Cal. 1923); *Tres Ritos Ranch Co. v. Abbott*, 44 N. M. 556, 105 P. (2d) 1070 (1940); *Imperial Development Co. v. City of Calexico*, 47 Cal. App. 666, 191 Pac. 50 (1926) (hearing denied by Supreme Court of California).

lidity of the statute as being in conflict with the prohibition in the United States Constitution of state taxation of imports or exports and with the power of Congress to regulate foreign commerce. Roger B. Taney argued the case for the State of Maryland seeking to uphold the license fee. This Court struck down the statute upon the ground that it was in conflict with both the import and commerce provisions of the United States Constitution.

This Court, speaking through Chief Justice Marshall, held that imports are things imported,—they are the articles themselves which are brought into this country. It is as imports that they bear this immunity from state imposition of imposts or duties. In answer to the argument of counsel for the State of Maryland that this constitutional provision, if carried to its logical extreme, would deny entirely the power of the State to tax imports, this Court held that at some given point in time goods which are imports become subject to the taxing power of a state. In resolving the question this Court stated (pp. 441, 442):

“It may be conceded that the words of the prohibition ought not to be pressed to their utmost extent; that in our complex system, the object of the powers conferred on the government of the Union and the nature of the often conflicting powers which remain in the States, must always be taken into view, and may aid in expounding the words of any particular clause. But, while we admit that sound principles of construction ought to restrain all courts from carrying the words of the prohibition beyond the object the constitution is intended to secure; that there must be a point of time when the prohibition ceases, and the power of the State to tax commences; we cannot admit that this point of time is the instant that the articles enter the country. It is, we think, obvious, that this construction would defeat the prohibition.”

“• • • It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it

has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution."<sup>4</sup>

Even though he argued against the position taken by the court in *Brown v. Maryland*, Chief Justice Taney later, in the *License Cases* (5 How. (46 U. S.) 504, 575, 1846) observed that more mature reflection convinced him that the holding of the court in *Brown v. Maryland* was correct.

"I argued the case in behalf of the State, and endeavored to maintain that the law of Maryland, which

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<sup>4</sup> Compare the following:

"*Genuine Information delivered to the Legislature of the State of Maryland Relative to the Proceedings of the General Convention held at Philadelphia in 1787, by Luther Martin, Esquire, Attorney-General of Maryland, and one of the Delegates in the said Convention.* 3, FARRAND, RECORDS OF THE FEDERAL CONVENTION (1911), p. 172 at 215:

"(73) By this same section, every State is also prohibited from laying any imposts or duties on imports or exports, without the permission of the general government. It was urged, that, as almost all sources of taxation were given to Congress, it would be but reasonable to leave the States the power of bringing revenue into their treasuries, by laying a duty on exports if they should think proper, which might be so *light* as not to injure or discourage industry, and yet might be productive of considerable revenue. Also, that there might be cases in which it would be proper, for the purpose of encouraging manufactures, to lay duties to prohibit exportation of raw materials; and, even in addition to the duties laid by Congress on imports for the sake of revenue, to lay a duty to discourage the importation of particular articles into a State, or to enable the manufacturer here to supply us on as good terms as they could be obtained from a foreign market. However, the most we could obtain was, that this power might be exercised by the States with, and only with the consent of Congress, and subject to its control. And so anxious were they to seize on every shilling of our money, for the general government, that they insisted even the little revenue that might thus arise, should not be appropriated to the use of the respective States where it was collected, but should be paid into the treasury of the United States; and accordingly it is so determined."

required the importer as well as other dealers to take out a license before he could sell, and for which he was to pay a certain sum to the State, was valid and constitutional; and certainly I at that time persuaded myself that I was right, and thought the decision of the court restricted the powers of the State more than a sound construction of the constitution of the United States would warrant. But further and more mature reflection has convinced me that the rule laid down by the supreme court is a just and safe one, and perhaps the best that could have been adopted for preserving the right of the United States on the one hand, and of the States on the other, and preventing collision between them. The question, I have already said, was a very difficult one for the judicial mind. In the nature of things, the line of division is in some degree vague and indefinite, and I do not see how it could be drawn more accurately and correctly, or more in harmony with the obvious intention and object of this provision in the constitution. Indeed, goods imported, while they remain in the hands of the importer, in the form and shape in which they were brought into the country, can in no just sense be regarded as a part of that mass of property in the State usually taxed for the support of the state government. . . .

This Court applied *Brown v. Maryland* with full force in *Low v. Austin*, 13 Wall. (80 U. S.) 29 (1871). In that case a statute of California subjected all property of every kind, name and nature within the state, with certain exceptions not here material, to taxation according to value. Low and others were importing, shipping and commission merchants in San Francisco. In 1868 they received wines on consignment from certain parties in France upon which the duties and other charges were paid at the customhouse. These wines were stored in the warehouse in the original cases in which they were imported and were there exhibited for sale. At this point they were assessed for state taxes which were ultimately paid under protest whereupon Low and the others sued the Tax Collector,

Austin, to recover the taxes so paid. The California trial court gave judgment for the plaintiffs and held the taxing statute void as contravening the federal prohibition on state taxation of imports. The Supreme Court of California reversed. Writ of error was then granted by this Court, which held that the California taxing statute, as applied to the facts of the case, was in contravention of the import clause of the Federal Constitution. The fact that the California tax reached all items of property uniformly and was not directed specifically upon imports as such did not aid the statute. Insofar as the statute levied a tax upon imports it was beyond the power of the state to enforce and therefore in contravention of the import clause of the Federal Constitution. Lacking the power to levy and assess such a tax, the question of whether it operated equally upon all properties or persons was not material.

In *Burke v. Wells*, 208 U. S. 14, 20 (1908) this Court said:

"The case referred to (*Brown v. Maryland*) is the leading one upon this subject, and has been cited perhaps as often as any of the great decisions of Chief Justice Marshall, and not attempted to be modified in the subsequent decisions of this Court."

<sup>5</sup> The cases dealing with the original package doctrine in interstate commerce should be distinguished from those cases involving the original package doctrine with reference to imports so far as immunity from state property taxation is concerned. This distinction was first made in *Woodruff v. Parham*, 8 Wall. 123 (1868); it was repeated again in *Brown v. Houston*, 114 U. S. 622 (1885) and in *American Steel and Wire Company v. Speed*, 192 U. S. 500 (1904). It was stated very cogently by Justice Taft in *Sonneborn Bros. v. Cureton*, 262 U. S. 506, 510 (1923): "The distinction is that the immunity attaches to the import itself before sale, while the immunity in the case of an article because of its relation to interstate commerce depends on the question whether the tax challenged regulates or burdens interstate commerce." It is not clear from its opinion that the Supreme Court of Ohio kept this

(Continued on next page)

### **C. Analysis of the Decision of the Ohio Supreme Court Upholding the Tax.**

The Supreme Court of Ohio upheld the tax in question upon two alternative grounds. First, the petitioner was not the importer, but a purchaser from the importer. Upon its construction of the facts it held that title to the fibers did not pass to the petitioner until after the goods arrived in this country and therefore, while conceding that the fibers in question were imports, it held that the importer was either the foreign shipper or his agent or broker in this country. Second, even if the petitioner were the importer, the fibers were not imported for sale but for the purpose of manufacture, had consequently become mixed with the general property of the state and therefore no longer enjoyed immunity from state taxation as imports. Because of its decision on these points, it did not find it necessary to decide whether the fibers coming from the Philippines were imports as being goods coming from a foreign country. The question was raised in timely fashion, however, and is now before this Court. The three issues will be considered in order:

### **D. The Petitioner Was the Importer of the Goods in Question.**

To support its conclusion that petitioner was not the importer the majority of the Ohio Supreme Court fastened upon certain statements in the record, and certain contractual provisions, which the parties in practice ignored, as de-

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*(Continued from preceding page)*

distinction in mind for in its opinion it said: "Assuming that appellant was the importer, these goods had so come to rest as to be mingled with the mass of property in this country when the state tax was levied thereon."

It is clear then that any reference to imports in cases dealing solely with interstate commerce constitutes dictum and not decision.

With reference to an unconstitutional tax on exports see *Spalding & Bros. v. Edwards*, 262 U. S. 66 (1923):

terminative and disregarded certain other undisputed or admitted facts which actually should be controlling. Quoting from the testimony of the petitioner's general manager that: "Our dealing with the seller was to get that material landed to a port of entry and cleared through and then it is turned over to us," the Ohio Supreme Court said that this accurately described the transactions by which the fibers were brought into this country and clearly showed that the petitioner was not the importer, but rather the purchaser of goods subsequent to their arrival in this country under a contract to buy them. In so holding it failed to consider all the undisputed and admitted facts of record.

It is axiomatic that constitutional rights will not be decided upon the form of a contract, but rather upon its substance and the actual course of dealing between the parties pursuant thereto. It is further settled that when constitutional rights or immunities are involved, this Court in cases coming to it from state courts will determine for itself from the record the existence of the controlling facts upon which such constitutional question is based. In *Davis v. Wechsler*, 263 U. S. 22, 24 (1923) Justice Holmes, speaking for the Court, said:

"If the Constitution and laws of the United States are to be enforced, this court cannot accept as final the decisions of the state tribunal as to what are the facts alleged to give the right or to bar the assertion of it even upon local grounds."<sup>6</sup>

With reference to federal control of interstate and foreign commerce, this Court has said that it is the essential character of the commerce, not the accident of local or through bills of lading which determine federal or state control thereover. *Railroad Commission of Louisiana v. Texas and Pacific Railroad Company*, 229 U. S. 336 (1913). The determination of the character of commerce with

<sup>6</sup> See *Coombes v. Getz*, 285 U. S. 434, 441 (1932); *Detroit United Ry. Co. v. City of Detroit*, 242 U. S. 238, 249 (1916).

reference to federal control, this Court stated, is " . . . a matter of weighing the whole group of facts in respect to it." *Atlanta Coast Line Railroad Company v. Standard Oil Company of Kentucky*, 275 U. S. 257, 268-9 (1927). The same reasoning should hold true in determining the existence, extent and possible infringements of rights and immunities conferred by the constitutional provision governing imports in cases coming to this Court from a State court. (*Waring v. Mayor of City of Mobile, infra*; *Low v. Austin, supra*.)

The Supreme Court of Ohio stated that the record discloses the goods in question were "purchased by petitioner from the New York agents of the sellers under written contracts which specifically provided that the sales were made f.o.b. port of entry in this country (i.e. landed), and that title was to remain in the seller until the goods were fully paid for" (R. 108). The terms of the contracts, the course of business and the intention of the parties indicate the complete contrary.<sup>1</sup>

The petitioner's general manager, in addition to the one sentence quoted by the Supreme Court of Ohio, testified (R. 58) that while it bought goods f.o.b. port, the price included normal ocean freight, insurance, expense of clearance through the customs, the commission of the agent

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<sup>1</sup> The understanding of those engaged in the export and import business appears to be contrary also. In Eldridge and Other Officials of the Bureau of Foreign and Domestic Commerce, *Export and Import Practice* (United States Department of Commerce, Trade Promotion Series—No. 175, 1938) at p. 162 it is said:

"An import broker in the United States is one who buys foreign goods, not for his own account, but for the account of another. He never takes title to the goods. His function is merely to bring buyer and seller together and negotiate the contract of sale. He may act either as agent for the buyer or as agent for the seller. For this service he receives a stipulated fee, payable by the party engaging him. After the sale is consummated the domestic buyer imports the goods in his own name, and arranges for their payment directly with the foreign seller."

in this country which included costs of arranging for rail shipment to Xenia, inspecting the bales and premium insurance up to one-half of one per cent. Any variances in freight or insurance were for the account of the buyer. In addition the entire premiums for marine and extra value insurance were paid for by the buyer.

The use of the expression "f.o.b." by the petitioner's witness was not particularly apt but read in the context it indicates the opposite from what the Supreme Court of Ohio construed it to mean.\* The use of the expression f.o.b. should be construed in connection with the entire undisputed testimony of the petitioner's principal witness, and the stipulated facts of record and so construed shows actually that the fibers were shipped c.i.f. from the foreign port of origin.

In *United States v. Andrews*, 207 U. S. 229 (1907), this Court indicated that in construing the words f.o.b. it would consider the entire contract and all the surrounding facts. In that case the contract provided that goods were to be shipped to the consignee by the seller from this country f.o.b. Manila, Philippine Islands. A note to the steamship agent attached to the contract stated that certain arrangements had been made by the United States Government, the buyer, for ocean freight rates after the goods were delivered to him f.o.b. Jersey City, N. J., later changed to Brooklyn. The buyer, United States Government, paid the freight as an element of the purchase price. The goods were damaged before they reached Manila and were refused by the consignee, the Governor-General of the Philippines. This Court held that the seller could recover the purchase price from the buyer, United States

\* A mistake or a slip in the use of a word should not stand in the way of a decision on the merits when it is obvious from a consideration of the entire facts of the case that a mistake or slip was made in the use of the word. See *Crew Levick Company v. Pennsylvania*, 245 U. S. 292, 294 (1917).

Government, in the Court of Claims. Title to the goods passed on delivery to the carrier at New York. The buyer paid all the ocean shipping charges from New York to Manila despite the fact that the contract provided that the shipment from this country was to be f.o.b. Manila, for the contract was required to be read in connection with the attached notes and the terms of the contract whereby the buyer was to pay the ocean freight charges to Manila.

The petitioner pays a "landed price" for the goods. This expression is merely a descriptive term to show the items included in the total price, items all covered in the contracts. It is not a specification of the time the parties intended title to pass as the Board of Tax Appeals and the Ohio Supreme Court evidently assumed.

The undisputed testimony and the stipulated facts in this case show clearly that each broker in New York acted as an agent for some grower or producer outside the continental limits of the United States, as in *United States v. Erie Railroad Company*, 280 U. S. 98 (1929). No contract was entered into until an offer from such foreign producer through his New York agent was accepted by petitioner or until an offer from petitioner through the New York agents was accepted by such foreign producer. No fibers were shipped into this country, so far as this case is concerned, except such as were shipped pursuant to contracts previously entered into. With the single exception of Stein Hall & Co. who for the years in question, did not disclose their principals but stated that they always acted for foreign principals, every broker asserted that he invariably sold for the account of or on behalf of his foreign principal. Stein Hall & Co. in fact acted for a foreign principal even though he was not disclosed.

Two situations are involved. First, where fibers already in existence were sold. Second, where the fibers were not yet grown,—a sale in effect of "future goods." In each case, however, when the fibers were shipped from the for-

foreign port they were earmarked not only for the petitioner, but appropriated to the specific contract involved. The declaration which was cabled to the agent in this country and by him immediately conveyed to the petitioner shows that the goods were so appropriated. The *pro forma* invoice sent to the petitioner a short time before the boat arrived at the port of entry shows a continuation of the same course of conduct. It was the custom of all except one of the brokers to send out the *pro forma* invoice. The *pro forma* invoice really had no utility in these transactions. Petitioner did not know why it was used. In the trade generally, however, it enabled the owner or consignee to make his own arrangements to get the goods through customs and to arrange for cash or credit to be available as each might be required by the particular sale.

The evidence shows (R. 60, 61, 76-77, 78, 82) petitioner had the right to dispose of the goods while in transit, and that the risk of loss from the time the goods were loaded on the steamer in the foreign port was upon the petitioner. This is amply substantiated, if such be necessary, by the undisputed testimony of petitioner's principal witness who stated that extra-value insurance was carried by his company upon the goods in question in order to protect the petitioner against loss of goods on a rising market (R. 58). Such insurance would not be available to the petitioner unless it had an insurable interest in the property involved. It could have such insurable interest if, but only if, some risk of loss of the goods in transit were upon it. (*California Ins. Co. v. Union Compress Co.*, 133 U. S. 387 (1890).)

The Supreme Court of Ohio stressed the concept of passage of title in determining that petitioner was not the importer. Just what it meant by title to the goods is not clear. The court did not state whether it meant a security interest, the right of stoppage *in transitu*, risk of loss, right to possession, beneficial interest or all of them combined. The question of passage of title or the time when that title

passed should not be controlling in determining whether or not petitioner is the importer in this case.

In *Waring v. Mayor of Mobile* (8 Wall., (75 U. S.) 110 (1868)), an ordinance of the City of Mobile imposed a tax upon sales of merchandise made therein and subjected the merchant to a fine if he refused to account for and to pay over to the city such sales tax. The complainant made large sales of salt, failed to account and was fined for breach of the ordinance. He sued to restrain enforcement of the fine. The facts showed that many vessels came from England to Mobile to load cotton. In order that such vessels might not have to come in ballast, the charterers or owners of the vessels in England, apparently without previous order from anyone in this country, shipped salt to the agents of the vessels in Mobile. The complainant purchased that salt from these agents sometimes before and sometimes after the ships entered the harbor. The terms of his contracts of purchase in every case, however, provided that the risk of loss would continue to be on the shipper until the salt was delivered to the complainant into his lighters. No such delivery could be made until after the salt was entered in the customs office at the port of entry by the consignee or owner, the custom duties secured or paid and a permit to unload secured from the collector of the port. All this was done by the consignees. The complainant sold, to various retailers, the salt in the original bags in which it came. He objected to the payment of the fine imposed by the city on the ground that the sales tax in question was essentially a tax on imports under the doctrine of *Brown v. Maryland*. This Court held, however, that he was not the importer of the goods but that he purchased the goods after they reached this country and hence the second sale of the goods in which complainant was the seller was subject to state taxation even though they were still in the original package. The complainant argued that he purchased the salt before it was brought into this country and therefore he

was the importer; the sale sought to be taxed was actually the *first* sale of the goods and under the previous holdings of this Court was immune from state taxation. With reference to this argument it is significant that no reliance was placed upon the technical question of title or the passage of title. Justice Clifford noted the provisions of the contracts and commented upon the property interests of the seller and buyer as follows:

“ . . . The contracts to purchase were made before the goods were entered at the custom-house, with the consignees of the salt, sometimes before and sometimes after the arrival of the vessel at the anchorage in the lower harbor, but the terms of the contract in all cases were that the risk should continue to be in the shipper until the salt was delivered to the complainant over the side of the vessel into his lighters. He agreed to furnish the lighters and to bring them alongside of the vessel, and the contract was that the salt, when it was transshipped into the lighters of the complainant, became his property, and he assumed the risk and expense of transporting the same to the wharf and from thence to his own warehouse or place of business; but if the goods were lost before such delivery the agreement to purchase was not obligatory.

“ Whether the contracts to purchase were made before or after the vessel arrived in the bay is quite immaterial, as the agreement was, that the risk should continue to be in the owner or consignees until they delivered the salt into the complainant's lighters, alongside of the vessel. Delivery, under the terms of the contract, could not be made before the vessel arrived, nor before the salt was legally entered at the custom-house, as the hatches could not be removed for any such purpose until the permit was received from the collector.”

This Court did recognize that goods at sea may be sold by the consignee and if such consignee endorses and delivers the bill of lading to the purchaser, who accepts such delivery as the substitute for actual delivery and acceptance

of the goods, the purchaser gets a perfect title thereto while the goods are still at sea with no right of stoppage *in transitu* remaining in the seller. Justice Clifford stated further:

"Nothing of the kind, however, was done in this case. On the contrary, the agreement was, that the loss, if before the delivery of the goods into the lighters, should fall on the shippers. Influenced by these considerations the court is of the opinion that the shippers or consignees were the importers of the salt, and that the complainant was the purchaser of the importers, and the second vendor of the imported merchandise." (120.)

Construing the *Waring* case to mean that he upon whom the risk of loss rests is the importer the Supreme Court of Washington, under a state statute imposing a tax upon one who imports oil into the state, held that where the Pacific Oil Company brought oil into that state from California under a contract to sell it to the Northern Pacific Railway Company, but by the terms of the contract the risk of loss was upon the Pacific Oil Company until actual delivery the latter was, by such provision, the importer within a state taxing statute. *State v. Fidelity & Deposit Co. of Maryland*, 194 Wash. 591, 78 P. (2d) 1090 (1938.)

In any event, three years after the *Waring* case was decided, *Low v. Austin* recognized that complete legal title need not necessarily be in the consignee for purposes of immunity from state property taxation under the imports clause of the Constitution.

In the case at bar the Supreme Court of Ohio held that the contracts of petitioners with the foreign producers gave rise to imports, but that the sale did not occur until some time after the goods reached this country. Exactly at what point of time the sale occurred the court did not state. It found that the purchase price was never paid until after the goods reached Xenia. It assumed that these were cash

sales. Presumably, therefore, it must have concluded that the sale occurred either in New York or Xenia.

Such conclusion is contrary to *Norfolk and Western Railway Company v. Sims*, 191 U. S. 441 (1903), in which this Court held that when a resident of North Carolina ordered a sewing machine, to be shipped c.o.d. from Chicago, the contract of sale was completed when the machine was shipped from Chicago pursuant to the order. The sale did not take place in North Carolina where the purchaser paid the c.o.d. fee, the freight charges and received the machine. See also *United States v. Andrews*, discussed *supra*, page 21.

If a sale occurred in New York, it must have occurred at the time the New York agent of the foreign seller opened credits for the account of his foreign principal. This would fit in with the theory of the Supreme Court of Ohio that the sale was a cash sale. As pointed out by Judge Bell, dissenting in the case at bar, however, no one would seriously contend that the agent or bank was the owner and, of course, the purchaser, of the fibers.<sup>9</sup> It is unthinkable that a principal would sell goods to his agent who would in turn immediately sell them to a customer of the principal upon orders previously accepted by the principal from the customer. If it be true that the agent of the foreign principal in New York is the purchaser then clearly he is not

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<sup>9</sup> The Tariff Act makes the consignee the owner of imports for the purpose of assessing import duties. Title 19, § 1483, U. S. C. By legislative fiat such consignee is made the owner of imports for the purpose and convenience of administering the tariff laws in an orderly manner. *United States v. Bishop*, 125 Fed. 181 (C. C. A. 8, 1903); Customs Regulations of 1923, Arts. 257, 258; 5 Code of Federal Regulations, Title 19, §§ 6.1, 6.8. Apparently the Ohio Board of Tax Appeals overlooked this important distinction (R. 98-99). The true owner may be some person other than the consignee. *Burke v. Davis*, 63 Fed. 456 (C. C. N. D. Ill., 1894). When an agent is the consignee of the goods imported his principal may be considered the real importer. *United States v. Mexican International Railroad Company*, 151 Fed. 545 (C. C. A. 5, 1907).

the importer but a purchaser from the importer within the doctrine of *Waring v. Mayor of Mobile*. The importer would, therefore, have to be the foreign principal. In such case if some sort of title remained in the seller till the goods were paid for, that title did not pass until the goods reached Xenia and were actually paid for according to the majority opinion.

It seems clear that the foreign principal is not the importer for he does not bring the goods into this country for the purpose of manufacture or sale. He sells them in the foreign country and ships them into this country for the purchaser,—petitioner. If the holding of the Supreme Court of Ohio on this point be carried to its logical extreme, there are (instead of a single transaction involved in the course of business here followed) a sale first from the principal to his agent and a second sale from the agent to the petitioner. Such is not consistent with the reasoning and implications in *Hamersley Mfg. Co. v. Erie Railroad Company*, 148 I. C. C. Rep. 47 (1928); reversed *sub nom. Eric R. R. Co. v. United States*, 32 F. (2d) 613 (D. C. S. D. N. J., 1929) decision of district court reversed and Interstate Commerce Commission affirmed in *United States v. Erie Railroad Company*, 280 U. S. 98 (1929).

In the *Erie Railroad Company* case the question was whether or not the Interstate Commerce Commission had jurisdiction to fix rates on shipments of paper pulp from Hoboken to Garfield, New Jersey. The pulp was imported from Germany under a course of business very similar to that followed in the case at bar, consigned to the agent of the German shipper in Hoboken who cleared it through the customs and re-shipped it on a local bill of lading to the H. Company, consignee, in Garfield, New Jersey. The H. Company had placed the order, which caused the goods to be brought to this country, with the agent in Hoboken who in turn transmitted it to his principal in Germany. In holding that this Court must look at the entire transaction to determine the existence of foreign commerce, and that

the shipment from Hoboken to Garfield, New Jersey was a shipment in foreign commerce within the meaning of the commerce clause of the Federal Constitution, this Court held that the parties intended the shipment from Germany to Garfield, New Jersey to be part of a single movement, that the form of the bill of lading was not controlling and that for constitutional purposes the entire movement was a unit. The question of passage of title was not material.

Applying the same reasoning by analogy, and upon very similar facts, it seems clear that in the case at bar the course of business, by which fibers are brought from Java (and other ports) to Xenia, constitutes one single transaction and not two transactions isolated from one another merely because an agent of the seller, for the convenience of his business and for the purpose of getting more business for himself, intervenes at the port of entry into this country and handles the details there necessary to secure the continued transportation of the fibers to the inland destination for the convenience of the petitioner who by its undisputed testimony is unable to and does not wish to be burdened with the details of customs clearance and rail shipping at the port of entry.

It seems clear from the undisputed and the admitted facts in the case at bar that the only sale here involved took place in a foreign port and that petitioner is the importer within the rule of *Waring v. Mayor of Mobile*. The undisputed and stipulated facts show that the risk of loss was upon petitioner from the moment the goods were delivered to the carrier at the port of origin in the foreign country. The beneficial interest vested in and the risk of loss was imposed upon the petitioner at that moment. In this connection the intention of the parties together with the contractual terms, the usages and customs of the trade and the undisputed facts concerning the course of business is controlling. (*Standard Casing Co., Inc. v. California Casing Co., Inc.*, 233 N. Y. 413, 135 N. E. 834 (1922); *Van Leunan*

*Co. v. Meddock*, 16 Ohio App. 309 (1922), motion to certify to Supreme Court of Ohio overruled, 20 Ohio L. Rep. 412 (1922)).

If the time of passage of beneficial title to the buyer be material in this case, then it seems entirely possible for constitutional purposes that title to the fibers in question or risk of their loss passed to the petitioner. (at the latest) the moment when the goods were earmarked for it, appropriated to the specific contract involved, and delivered to the carrier, quite often selected in advance by the petitioner, at the port of origin. *United States v. Andrews*, *supra*.

In *The Merrimack*, 8 Cranch (12 U. S.) 317 (1814) the question was whether the captor of an enemy ship in war-time was entitled to certain goods seized thereon as a prize on the theory that they were enemy goods, or whether these goods belonged to the claimants who were American citizens. The claimants had ordered the goods from the English manufacturing firm of Harris & Leich, of Leicestershire, England. Leich, an English citizen, lived in Leicestershire and Harris, an American citizen, resided in the United States. The bill of parcels for the goods, which served as an invoice, was in the name of the claimants. By bill of lading the goods were consigned to Harris. The sale was on credit. The goods were accompanied by a letter from Leich to Harris, the essence of which was that because of troubled international conditions the goods were shipped to Harris so that he could, if necessary, make a *bona fide* claim that they were his property. It was also stated that "... shipping them to you gives the power of keeping back to you." (319) Harris & Leich sent a letter, also on the same boat, from England to the claimants in which it was explained that to protect the goods in question they shipped them to Mr. Harris who could claim them, in the event of seizure, as his *bona fide* property. On this set of facts the claimants appeared in the prize court and

set up their claim to the goods in question. This Court held that the claimants should prevail, as a matter of prize law, and that title to the goods passed in England to the American claimants. The fact that the bill of lading was made out to Harris and not to the claimants did not affect the rights between the parties. The fact that the goods were subject to stoppage *in transitu* did not affect the passage of title. The bill of lading made out to Harris only gave him the right to demand the goods from the captain of the ship. The claimants by virtue of the invoice had the right to demand the goods from Harris. Both letters mentioned above stated that the shipment was made *on account of* the claimants. (The shipments in the case at bar were made the same way. R. 71, 84.) Inasmuch as this was a sale on credit, the court said it was not even necessary that the claimants make a tender of the purchase price to Harris before demanding the goods. The right of the consignee to demand the goods from the captain of the ship was not to acquire them for his own use but to the use of the claimants on whose account and for whose order they were actually shipped.<sup>10</sup>

In *Blum v. Caddo*, 3 Fed. Cas. 753 (C. C. D., La. 1870), the court held that delivery of goods to the carrier is constructive delivery to the vendee even though the vendee is a stranger to the carrier. The fact that the shipper has the right of stoppage *in transitu* does not mean that the risk of loss of the goods remains upon the vendor. Such right of stoppage *in transitu* is an additional security right to be exercised in the proper situation. If insurance is taken out by the vendor, but paid for by the vendee as an element of the purchase price, the situation is not altered and such insurance is not controlling in determining whether the risk of loss is on the vendee.

<sup>10</sup> *The Odessa*, [1916] 1 A. C. 145, 154.

The fact that on the marine bill of lading the goods were consigned to the order of the shipper, notify *Hooven & Allison* or in some cases notify his agent, or were consigned on a straight marine bill of lading to the agent of the shipper does not alter the fact that the risk of loss or the beneficial interest in the goods passed to the buyer when the goods were delivered to the carrier at the foreign port. As previously mentioned, the question of imposition of risk of loss or the transfer of property in the goods is one of intention and that intention is to be gathered from all the facts of the case which include the contract, course of dealing between the parties and their intention ascertained in any other proper manner. In *Robinson and Martin v. Houston and T. C. Railway Company*, 105 Tex. 185, 146 S. W. 537 (1912), when goods were shipped to the consignee on an order bill of lading consigned to the seller's order with draft for the purchase price attached, with instructions to notify the buyer, it was held that title to the goods there involved passed when the goods were shipped. The buyer paid the freight. The court clearly distinguished between the right of possession which remained in the seller until the goods were paid for and the title or risk of loss which passed to the buyer when the goods were delivered to the carrier at the point of shipment. In *Standard Casing Company, Inc. v. California Casing Company, Inc.*, 233 N. Y. 413, 135 N. E. 834 (1922) goods were to be shipped f.o.b. San Francisco to New York by order bill of lading with sight draft attached. The buyer had the right of inspection before acceptance of the goods. The seller reserved the right to consign the goods to the order of the seller or the buyer. The goods were never shipped and the buyer sued the seller for damages for breach of the contract. The question was whether the market price in San Francisco or New York should prevail. The court held that if the goods had been shipped title would have passed upon delivery to the carrier in

San Francisco with risk of loss upon the buyer from such point. Judge Cardozo stated:.

“ \* \* \* Title passes upon shipment, though subject to the right of rescission upon the discovery of defects.  
\* \* \*

“The incidence of the risk is unaffected also by the right, retained by the defendant, to determine whether the bill of lading should run to consignor or consignee. \* \* \*

While a New York statute was involved, it was held merely declaratory of the common law. Accord: *The Van Leunen Company v. Meddock*, 16 Ohio App. 309 (1922), motion to certify overruled by the Supreme Court of Ohio, 20 O. L. Rep. 412 (1922); *Price v. Baum*, 71 Ohio App. 160, 48 N. E. (2d) 123 (1942).

In the case at bar normal marine insurance was taken out by the seller at the point of origin and the premium therefor paid by the buyer as one of the items going to make up the total purchase price. The war risk insurance was likewise taken out by the seller at the point of origin but because of the then fluctuating premiums the buyer agreed in his contract of purchase covering the goods to pay the cost of war risk insurance in excess of one-half of one per cent of the insured value. This insurance in each case was payable either to the foreign shipper, his broker agent in New York, or the bank, as the interest of each might appear. The reason why the insurance was so payable was explained by the brokers. Their principals were located on the opposite side of the globe. In case of loss, adjustment and collection of the purchase price might be difficult. To protect themselves, this insurance was taken. If any bank had advanced any money on the shipping documents, the bank would be indemnified from the insurance. In many cases to facilitate the transactions involved, the New York agents, who were in very close touch with Hooven & Allison at all times, would open credits at

a bank in favor of the sellers. In case of loss of the goods in such case, the insurance would amply protect them.

An understanding of the course of business of these fiber brokers clearly explains why they opened credits for their principals, the foreign sellers. The volume of business handled by them determines the maximum amount of commissions they can earn. The more service they can render to prospective purchasers in this country, the greater the business that potentially or actually will be theirs (R. 78-79). In effect they guaranteed the foreign principals against the credit that was extended to the purchasers in this country (R. 69, 81-82). One of the principal reasons why these brokerage houses continue in existence is the services they can render to domestic purchasers in effecting the sales of fiber for their foreign principals, the services they can render to their foreign principals in effecting collections in this country, their services in arranging at the port of entry in this country for the clearing of the fibers through customs and transshipment to interior points where manufacturing establishments are located. These latter services are customarily performed by the brokers on behalf of their foreign principals, but in reality as accommodations to and for the convenience of the American buyers.<sup>11</sup> In short

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<sup>11</sup> The necessity for close contact with New York brokers is shown by the following testimony, which also discloses that petitioner was well known to the foreign principals (R. 56):

"Chairman Jenkins: Then all your negotiations are carried out with their agents in New York?

"The Witness: Yes. Principals will sometimes make a visit. We have an occasion where one of the principals was here from the Dutch East Indies talking over things and made a deal with him; the agent was there too—just a courtesy order, and happened to be a big one, a thousand tons of stuff. But the reason for the agents is they understand things here and those are big distances and quite often transactions have to be consummated quickly. The market may shift. It is so sensitive that if we make a bid or offer something at two o'clock and call back at three, unless they want to do it, it is gone."

these agents are almost indispensable in handling a course of business with which domestic purchasers are unfamiliar and ill-equipped at best to handle for themselves.

The undisputed testimony shows that petitioner did not want to be bothered by making trips to New York and undertaking itself to clear the fibers through customs and in arranging for their transshipment. It preferred to have this done by someone else under such circumstances as would include as an element of the purchase price the cost of these services.

**E. The Term Imports Comprehends Goods Brought Into the United States Both for Purposes (a) of Sale, and (b) of Manufacturing or Processing Before Sale.**

In *Brown v. Maryland*, *Waring v. Mayor of Mobile* and *Low v. Austin*, *supra*, the goods involved were all manufactured or processed goods brought into this country for the purpose of sale. In *Brown v. Maryland*, the statute specifically applied to an importer who brought foreign goods in to Baltimore for sale at wholesale, and in *Waring v. Mayor of Mobile*, the city ordinance involved imposed a tax on sales of goods. In *Low v. Austin* a general tax on personal property was in question. If this Court in these decisions had gone beyond the question of whether or not goods brought in for sale were subject to taxation by the state, any such utterance would have been *obiter dictum*. Notwithstanding this fact, the Supreme Court of Ohio based its decision upon the alternative ground that none of the fibers in question were brought in for sale but rather for the purpose of conversion by manufacturing processes, and therefore did not enjoy immunity as imports from state taxation. That the finished products were thereafter to be sold was not mentioned. It held, therefore, that the state tax sought here to be imposed did not intercept the goods nor deny to them privilege of becoming incorporated in the general mass of local property.

until such time as the tax was paid. It is submitted such holding is not supported by the authorities, by logic or by sound reasoning. In *Brown v. Maryland* the goods involved were imported for sale at wholesale. In 1827, when that case was decided, practically all the imports of this country were of finished products or products for consumption. (Bogert, *Economic History of the United States* (1938), 174-179). *Waring v. Mayor of Mobile* involved processed salt, and *Low v. Austin* bottled wine, all intended for sale. Therefore, the foundation cases for this rule dealt only with imports of finished products brought in for the purpose of sale. The concept of imports has not been so confined, however.

In *Gulf Fisheries Company v. MacInerney*, 276 U. S. 124 (1928), the complainant fish company sued to enjoin the enforcement of a license fee, imposed upon wholesale fish dealers by the State of Texas, based on the poundage of fish handled by the dealer. The Gulf Fisheries, a New York corporation, through its agents caught the fish in the Gulf of Mexico, apparently in international waters, landed them in bulk from the fishing boats on the wharf in Galveston, Texas, where some eighty-five per cent were processed,—the remainder merely washed, packed into barrels with ice and sold. None were placed in cold storage. Usually all the fish caught one day were shipped the same day. The complainant claimed that the fish were imports and therefore immune from state taxation. In deciding against the complainant the late Justice Brandeis stated "We have no occasion to inquire whether the fish are imports. Nor need we enquire whether the statute can be considered as an inspection law. On the facts agreed the tax is not laid until the fish have lost their distinctive character as imports and have become through processing, handling and sale a part of the mass of property subject to taxation by the state." The last sentence of the opinion states "They have lost their distinctive character as im-

ports and have become taxable by the state." It seems a fair inference from this case that if a property tax were involved and the fish had been held for processing and sale they would not have been liable to state taxation until such time as they had been processed, and possibly sold, but at least until they had been processed. See also *McGoldrick v. Gulf Oil Corporation*, 309 U. S. 414 at 423 (1940) wherein this Court said:

"For present purposes we may assume, without deciding, that had the crude oil not been imported in bond it would, upon its manufacture, have become a part of the common mass of property in the state and so would have lost its distinctive character as an import and its constitutional immunity as such from state taxation. See *Gulf Fisheries Co. v. MacInerney*, 276 U. S. 124; 126; *Waring v. The Mayor*, 8 Wall. 110; *May v. New Orleans*, 178 U. S. 496; *New York ex rel. Burke v. Wells*, 208 U. S. 14."

The Supreme Court of Louisiana in *Mexican Petroleum Corporation of Louisiana v. Louisiana Tax Commission*, 173 La. 604, 138 So. 117 (1931) squarely held that crude oil brought into Louisiana from Venezuela and Mexico for refining, and rape-seed oil brought into Louisiana from England for processing, and then sale, were imports within the meaning of the imports clause of the Federal Constitution and until such time as they were processed or sold were immune from state property taxation.

In summary, there is nothing in the imports clause of the Federal Constitution or the original package doctrine which prohibits the conclusion that imports may be brought from foreign countries into this country for sale but that processing may precede the sale, and until such time as the goods are processed they carry as imports an immunity from state property taxation. The decisions, either directly or inferentially, apply or recognize the immunity.

**F. Articles Brought Into This Country From the Philippine Islands Are Imports Within Article I, Section 10, Clause 2 of the Constitution.**

As to the fibers involved in this case which were brought into the United States from places other than the Philippine Islands, it is conceded that they were imports. With respect to fibers brought from the Philippines, the Supreme Court held that they were not imports since they had not come from a foreign country (R. 91). To this holding it is respectfully submitted, there are two answers: (1) under Article I, Section 10, Clause 2 of the Constitution, an article need not come from a foreign country to be an import as long as its point of origin is a point outside the territorial limits of the forty-eight states of the United States; and (2) conceding for the sake of argument only that an article to be an import must come from a foreign country, the Philippine Islands are a foreign country for the purpose of determining the scope of the immunity from state taxation stemming from Article I, Section 10, Clause 2 of the Constitution.

**1. Fibers Brought into this Country from Abroad Constitute Imports within the Constitutional Provision.**

The word "imports" as used in Article I, Section 10, Clause 2 of the Constitution of the United States was defined by Chief Justice Marshall in *Brown v. The State of Maryland*, 12 Wheat. (25 U. S.) 419, 437 (1827). He stated:

"What, then, are 'imports?' The lexicons inform us, they are 'things imported.' If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles themselves which are brought into the country."

In this definition imports are not described by reference to their place of origin as a distinguishing characteristic. Later cases, however, at first glance seem to have added

the qualification that an article cannot be an import unless it has been brought into the country from a country foreign to the United States. Thus, in *Patapsco Guano Company v. Board of Agriculture*, 171 U. S. 345, 350 (1898), and in *Pittsburgh and Southern Coal Company v. Louisiana*, 156 U. S. 590, 600 (1895), it was said that the term "imports" applies only to articles imported from foreign countries, citing *Woodruff v. Parham*, 8 Wall. (75 U. S.) 123 (1868), as authority for this proposition. While it is true in that case Justice Miller said that no one would for a moment think of imports as having relations to any other articles than those brought from a country foreign to the United States, it must be remembered that the issue to which he was addressing himself was whether or not articles brought into the State of Alabama from sister states were immune from taxation under Article I, Section 10, Clause 2 of the Constitution, and for that reason it was only necessary for him to determine whether or not goods brought into Alabama from such states could be regarded as imports. In holding that such goods were not imports he used the phrase "country foreign to the United States" merely to designate a place beyond the borders of the United States, without intending to refer to any specific place or places so situated. This interpretation of the language of Justice Miller seems warranted by his comment which immediately followed that "it is reasonable to suppose that . . . in defining imports as articles brought into the country, the Chief Justice used the word country as a synonym for United States," which, as will hereafter be shown, means the states composing the federal union and not the territory subject to its jurisdiction and under its sovereignty.

The term "United States" may be used in any one of at least three different senses: first, as the collective name of the states which are united together by and under the Constitution of the United States; second, as the name of a sovereign occupying a position analogous to that of other

sovereigns in the family of nations; and, third, to designate the territory over which the sovereignty of the United States extends. Commenting on these uses of the term, Dean Langdell, in an article, "*The Status of Our New Territories*," 12 Harv. L. Rev., 363, 371 (1899), said:

"... the use of the term 'United States' to designate all territory over which the United States is sovereign, is, like the similar use of the word 'empire' in England and other European countries, purely conventional; and ... it has, therefore, no legal or constitutional significance. Indeed, this use of the term has no connection whatever with the Constitution of the United States, and the occasion for it would have been precisely the same if the Articles of Confederation had remained in force to the present day, assuming that, in other respects, our history had been what it has been.

"The conclusion, therefore, is that, while the term 'United States' has three meanings, only the first and second of these are known to the Constitution; ..."<sup>12</sup>

On the assumption, therefore, that the word country was used by Chief Justice Marshall, as a synonym for the words United States, and that the words United States denote the collective name of states united together by and under the Constitution, it follows that an article is an import irrespective of the place of its origin so long as that place lies outside the territorial limits of the forty-eight states which compose the federal Union. This statement has the support of cases which hold that fish caught in the open sea and brought into the United States are imports within Article I, Section 10, Clause 2 of the Con-

<sup>12</sup> See also Thayer, *Our New Possessions*, 12 Harv. L. Rev. 464 (1899); Thayer, *The Insular Tariff Cases in the Supreme Court*, 15 Harv. L. Rev. 164 (1901); Littlefield, *The Insular Cases*, 15 *ibid.* 169, 281 (1901). A more recent article in which the subject has been considered is Fisher, *The Status of the Philippine Islands under the Independence Act*, 19 American Bar Association Journal 465 (1933).

stitution. *Gulf Fisheries Co. v. Darrouzet*, 17 F. (2d) 374, 376 (1926); *Booth Fisheries Corporation v. Case*, 182 Wash. 392, 47 P. (2d) 834, 835 (1935). In *Gulf Fisheries Company v. MacInerney*, *supra*, p. 36, where it was claimed that fish caught in the Gulf of Mexico and landed in Texas were immune from state taxation as imports, this Court said that there was no occasion to inquire whether such fish were imports because on the agreed facts the tax was not laid until the fish had lost their alleged distinctive character as imports and had become through processing, handling and sale, a part of the mass of property subject to taxation by the state.

**2. In Any Event, Shipments to the Petitioner from the Philippine Islands. Are within the "Original Package" Doctrine.**

The Treaty of Paris, signed on December 10, 1898, and ratified on April 11, 1899, by which the Philippine Islands were ceded by Spain to the United States, unlike the treaties by which Florida, Louisiana and California were acquired, contains no provision which obligated the United States eventually to admit them into the Federal Union. On the contrary, it has always been assumed that they would be made independent as soon as they had developed the capacity for self-government. In 1934, the Philippine Independence Act was passed (48 Stat. 456, c. 84), under which, subject to war conditions, they will be set free in 1946. Thus, they have not and never will become a state in the union of states under the Constitution, *Texas v. White*, 7 Wall. (74 U. S.) 700, 721 (1868), and they are not and never have been a part of the United States except in the sense that internationally they are territory over which the United States is sovereign.

The history of the relation between the United States and the Philippine Islands is summarily stated in *Cincinnati Soap Company v. United States*, 301 U. S. 308, 318-320 (1937). There the court described the Philippines as

a dependency over which the United States for more than a generation has had and exercised the power of legislation and administration within the terms of the treaty of cession and those principles of the Constitution which by their nature are inherently inviolable. The Court said:

“ \* \* \* the United States began by governing the Philippine Islands under the war power. Following the Treaty of Paris, a condition of armed insurrection persisted for some time. In 1900, military government was succeeded by a species of executive government. \* \* \* In 1902, Congress provided for a complete system of civil government under the original Philippine Organic Act. By degrees, the active powers of the dependency have been enlarged, and those of the federal government decreased. But the authority which conferred additional power might at any time have withdrawn it. \* \* \* ”

The Court also considered the question whether the passage of the Philippine Independence Act and the adoption and approval of the Constitution for the Commonwealth of the Philippine Islands has created a different situation. Continuing, it stated:

“ \* \* \* Undoubtedly, these acts have brought about a profound change in the status of the Islands and in their relations to the United States; but the sovereignty of the United States has not been, and, for a long time, may not be, finally withdrawn. So far as the United States is concerned, the Philippine Islands are not yet foreign territory. \* \* \* ”

While the foregoing statement, that “so far as the United States is concerned the Philippine Islands are not yet foreign territory,” may or may not be exact, it has obviously no application to the problem involved in this case,—namely, whether goods brought from the Philippine Islands into the state of Ohio are imports within the meaning of Article I, Section 10, Clause 2 of the Constitution. In the proceedings before the Board, counsel for respondent strongly relied upon the *Case of the Diamond*

*Rings (Fourteen Diamond Rings v. United States, 483 U. S. 176, 1901).* That litigation arose under the Tariff Act of July 24, 1897, 30 Stat. 151. Pepke, as a soldier in the United States Army, after service in the Philippine Islands, returned to the United States and, on arriving at San Francisco, was discharged. He brought with him from Luzon fourteen diamond rings which he had there purchased, subsequent to ratification of the Treaty of Paris, February 6, 1899, and the proclamation thereof by the President April 11, 1899. In May, 1900, in Chicago, these rings were seized by a customs officer as having been imported contrary to law, and an information was filed to enforce their forfeiture. Pepke filed a plea claiming that the rings were not subject to customs duty, but it was held insufficient and forfeiture and sale were decreed. A writ of error was then prosecuted to this Court. The Tariff Act of July 24, 1897 was a regulation of commerce with foreign nations and levied duties upon all articles imported from *foreign countries*. The question presented was, therefore, were the rings acquired by Pepke after the ratification of the treaty was proclaimed, when brought by him from Luzon to California, imported from a foreign country? In holding that the rings were not subject to duty, the Court put its decision on the ground that the Philippine Islands were not a foreign country within the meaning of the phrase, "*imported from foreign countries*," as used in the Tariff Act. For its authority the court relied upon the case of *De Lima v. Bidwell*, 182 U. S. 1 (1901), where the question was whether goods imported into New York from Puerto Rico, after the cession, were subject to duties imposed by the Act of 1897 on "*articles imported from foreign countries*." It was held that they were not. The Court found that that act regulated commerce with foreign nations and that Puerto Rico had ceased to be within that category since territory could not be foreign and domestic at the same time. In *Downes v. Bidwell*, 182 U. S. 244

(1901), decided the same day, the Court held that Puerto Rico did not become a part of the United States within the meaning of Article I, Section 8, Clause 2, which declares that "all duties, imposts and excises shall be uniform throughout the United States." Putting these cases together, it is evident that all that was decided by *DeLima v. Bidwell* and therefore by the *Case of the Fourteen Diamond Rings* is that for the purposes of the Tariff Act of 1897, then under consideration, Puerto Rico and the Philippine Islands were not, after cession to the United States, foreign countries within the meaning of those words as used in that act. Likewise, all that can be drawn from *Downes v. Bidwell* is that for the purposes of Article I, Section 8, Clause 2, of the Constitution, Puerto Rico was not a part of the United States within the scope of that constitutional limitation. Manifestly, none of these cases can be regarded as authority for the proposition that fiber brought from the Philippine Islands is not an import within the meaning of Article I, Section 10, Clause 2 of the Constitution.<sup>13</sup>

<sup>13</sup> Cf., *Dorr v. U. S.*, 195 U. S. 138, 142-143 (1904):

"In every case where Congress undertakes to legislate in the exercise of the power conferred by the Constitution, the question may arise as to how far the exercise of the power is limited by the 'prohibitions' of that instrument. The limitations which are to be applied in any given case involving territorial government must depend upon the relation of the particular territory to the United States, concerning which Congress is exercising the power conferred by the Constitution. That the United States may have territory, which is not incorporated into the United States as a body politic, we think was recognized by the framers of the Constitution in enacting the article already considered, giving power over the territories, and is sanctioned by the opinions of the justices concurring in the judgment in *Downes v. Bidwell*, supra."

See also *United States West India Oil Co. v. Damenech*, 311 U. S. 20 (1940).

*a. Legislative Background of Philippine Commerce.*

Since the era of the Insular Cases, Congress has constantly regarded the commerce of the Philippine Islands as wholly separate and distinct from the ordinary domestic commerce of the United States. It would accordingly be well to know the nature of that legislative treatment, as it existed during the years involved within the facts of the present case. To begin with, there are legislative restrictions upon the amount of manila and other fiber products which may be "exported to the United States . . . under export permits issued by the government of the Philippine Islands":

"Effective May 1, 1935, and for three years thereafter, the total amount of all yarns, twines, cords, cordage, rope, and cable, tarred or untarred, wholly or in chief value of Manila (abaca) or other hard fiber, produced or manufactured in the Philippine Islands, coming into the United States from the Philippine Islands, shall not exceed six million pounds during each successive twelve months period, which six million pounds shall enter the United States duty free.

"The amount or quantity of such articles which may be so exported to the United States shall be allocated, under export permits issued by the Government of the Philippine Islands, to the producers or manufacturers thereof." (U. S. C., Tit. 48, § 1236a. 47 Stat. 765; 48 Stat. 460.)

There are likewise provisions with reference to the amount of the "export tax" which may be levied on articles "exported to the United States from the Philippine Islands," (U. S. C., Tit. 48, § 1236(c). 47 Stat. 764; 48 Stat. 459). While it is true that the act of December 22, 1941 (U. S. C., Tit. 48, § 1236c; 55 Stat. 852), suspended the progressive reduction of quotas of the Philippine articles brought into the United States, nothing in this war-time measure amended the classification of such fibers as "exports."

Furthermore, the sugar quota law is clear and specific in defining as "imports" the amounts of that product brought into the United States from the Philippines:

"(1) Having due regard to the welfare of domestic producers and to the protection of domestic consumers and to a just relation between the prices received by domestic producers and the prices paid by domestic consumers, the Secretary of Agriculture may, in order to effectuate the declared policy of this Act, from time to time, by orders or regulations—

"(A) (i) Forbid processors, persons engaged in handling of sugar, and others from importing sugar into continental United States . . . from the Virgin Islands, Philippine Islands, the Canal Zone, American Samoa, the island of Guam and from foreign countries, including Cuba, respectively, in excess of quotas fixed by the Secretary of Agriculture, for any calendar year, based on average quantities therefrom brought into or imported into continental United States . . ." (U. S. C., Tit. 7, § 608a. 48 Stat. 672; 49 Stat. 762; 50 Stat. 247).

In other words, for the sake of the domestic market, there are direct limitations placed on those "importing sugar into continental United States . . . from the Philippine Islands."

As already indicated, commerce between the Philippine Islands and continental United States is subject to general tariff regulations. For one thing, the Philippines have long been empowered to enact a tariff law:

"While this chapter provides that the Philippine government shall have the authority to enact a tariff law the trade relations between the islands and the United States shall continue to be governed exclusively by laws of the Congress of the United States. . . ." (U. S. C., Tit. 48, § 1042; 39 Stat. 548.)

For another thing, along with this authority conferred on the Islands government by the Jones Act of 1916, there has been legislative recognition of the taxability of articles

brought into the United States from the Philippines. To all intents and purposes Philippine imports are treated by the tariff laws just like those coming from other countries:

"There shall be levied, collected, and paid upon all articles coming into the United States from the Philippine Islands the rates of duty which are required to be levied, collected, and paid upon like articles imported from foreign countries. \* \* ." (U. S. C., Tit. 19, § 1301; 46 Stat. 685.)<sup>14</sup>

The older tariff legislation has also been amended accordingly (U. S. C., Tit. 19, § 577; 32 Stat. 55).

Granted commercial relations with the Philippines have received from Congress special discriminatory treatment, it is important to note the increasing limitations being placed upon the travel of Filipinos to continental United States. For example, there is now a definite quota set up for immigration:

"(1). For the purposes of Chapter 6 of Title 8 (except section 213(c)), this section, and all other laws of the United States relating to the immigration, exclusion, or expulsion of aliens, citizens of the Philippine Islands who are not citizens of the United States shall be considered as if they were aliens. For such purposes the Philippine Islands shall be considered as a separate country and shall have for each fiscal year a quota of fifty. \* \* ."

"(4) For the purposes of sections 154 and 156 of Title 8, the Philippine Islands shall be considered to be a foreign country." (U. S. C., Tit. 48, § 1238, 47 Stat. 768; 48 Stat. 463.)

Moreover, American consular officers are to be stationed in the Philippines for the purpose of supervising the movement of these "aliens" to the United States:

<sup>14</sup> See 5 Code of Fed. Reg. (*Customs Regulations*), Tit. 19, § 5.2:

"(A) The Philippine Islands are not within the customs territory of the United States. Shipments between those islands and the United States are the subject of various specific statutory provisions defining their status. \* \* ."

“(3) Any Foreign Service officer may be assigned to duty in the Philippine Islands, under a commission as a consular officer, for such period as may be necessary and under such regulations as the Secretary of State may prescribe, during which assignment such officer shall be considered as stationed in a foreign country; . . .” (U. S. C., Tit. 48, § 1238, 47 Stat. 767; 48 Stat. 463.)

Various miscellaneous provisions fill in the details of the picture, so far as commercial “imports” from the Philippine Islands to continental United States are involved. In the first place, the Philippine Islands are now omitted from inclusion in the term “United States”:

“When used in this section in a geographical sense, the term ‘United States’ includes all Territories and possessions of the United States, except the Philippine Islands, the Virgin Islands, American Samoa, and the island of Guam. . . .” (U. S. C., Tit. 48, § 1236; 47 Stat. 764; 48 Stat. 459.)

Again, commercial intercourse between the Commonwealth and this country must still take into account the circumstance that the islands have their own coinage and currency (U. S. C., Tit. 48, §§ 1142 *et seq.*; 32 Stat. 952). A third instance has to do with the application of the anti-trust laws: by specific provision, the Philippine Islands are expressly excluded (U. S. C., Tit. 15, § 12, 38 Stat. 730). And finally under the heading *Detail of Officers and Men to Assist Foreign Governments*, it has been enacted that the President may detail officers and men of the Army to assist the governments of the republics of the Western Hemisphere and the “Philippines” (U. S. C., Tit. 10, § 540; 44 Stat. 565; 49 Stat. 218; 56 Stat. 763).

In the present state of federal legislation, it may well be said that articles brought into the various states of the United States from the Philippines should presently be regarded as imports within Article I, Section 10 of the Constitution. If one will substitute *Philippine Islands* for

*Porto Rico* in the following quotation, the views of Justice White in *Downes v. Bidwell* are applicable here (182 U. S. 244, 341):

"The result of what has been said is that whilst in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, because the Island had not been incorporated into the United States, but was merely appurtenant thereof as a possession. As a necessary consequence, the impost in question assessed on merchandise coming from Porto Rico into the United States after the cession was within the power of Congress, and that body was not, moreover, as to such imposts, controlled by the clause requiring that imposts should be uniform throughout the United States; in other words, the provision of the Constitution just referred to was not applicable to Congress in legislating for Porto Rico."

William Howard Taft, the first Governor-General of the Philippines, in *Balzac v. Porto Rico*, 258 U. S. 298, 305 (1922), while Chief Justice of this Court, after holding that certain provisions of the Constitution did not apply to Porto Rico, stated:

"It was further settled in *Downes v. Bidwell*, 182 U. S. 244, and confirmed by *Dorr v. United States*, 195 U. S. 138, that neither the Philippines nor Porto Rico was territory which had been incorporated in the Union or become a part of the United States, as distinguished from merely belonging to it; and that the acts giving temporary governments to the Philippines, 32 Stat. 691, and to Porto Rico, 31 Stat. 77, had no such effect. The *Insular Cases* revealed much diversity of opinion in this court as to the constitutional status of the territory acquired by the Treaty of Paris ending the Spanish War, but the *Dorr Case* shows that the opinion of Mr. Justice White of the majority, in *Downes v. Bidwell*, has become the settled law of the court."

One may properly say, therefore, that the degree of foreignness or domesticity is in essence a matter for Congressional determination.<sup>15</sup>

*The Philippine Independence Act of 1933.*

In any discussion of the effect of the Philippine Independence Act, one meets at the start the *dictum* of Justice Sutherland in *Cincinnati Soap Company v. United States* (301 U. S. 308, 319, 1937):

"So far as the United States is concerned, the Philippine Islands are not yet foreign territory."

Yet it must be remembered that this Court was then confronted with the serious problem of upholding a federal processing tax on Philippine products, in the light of the then-binding authority of *United States v. Butler* (297 U. S. 1 (1936)). Justice Sutherland sought accordingly to bring the tax within the federal authority to lay taxes "to pay the debts of the United States"; and held that this excise was valid as an appropriation in discharge of a high moral obligation, amounting to a "debt" within the meaning of the Constitution. In these circumstances, that *dictum* regarding the status of the islands must be regarded as one compelled by the decision in *United States v. Butler*. Since the latter case is no longer controlling, the precise extent of Philippine sovereignty may once more be examined.

By virtue of the Philippine Independence Act of 1933, a constitution has been drafted for the government of the Commonwealth of the Philippine Islands, providing for the exercise of jurisdiction over all the territory ceded to the United States by the treaty of peace concluded between the United States and Spain on December 10, 1898. Furthermore, in accordance with law, that constitution has

<sup>15</sup> Cf. *Fleming v. Page*, 9 How. (50 U. S.) 603 (1849).

been submitted to the President of the United States; and it has been duly certified by him as conforming substantially to the Philippine Independence Act. Thereafter, the constitution has been ratified by the people of the Philippine Islands, and appropriate officers chosen for the Commonwealth government. Following these events, by Proclamation No. 2148 of November 14, 1935, the President of the United States has proclaimed the termination of the Philippine government and the formation of the government of the Commonwealth of the Philippine Islands.<sup>16</sup>

It is thus important to note the express provision of the Act with reference to the transfer of property and rights to the Philippine Commonwealth:

"All the property and rights which may have been acquired in the Philippine Islands by the United States under the treaties mentioned in the section 1231 of this title, except such land or other property as has heretofore been designated by the President of the United States for military and other reservations of the Government of the United States, and except such land or other property or rights or interests therein as may have been sold or otherwise disposed of in accordance with law, are hereby granted to the government of the Commonwealth of the Philippine Islands when constituted." (U. S. C., Tit. 48, § 1235. 47 Stat. 764; 48 Stat. 459.)

The resultant juridical status of the Commonwealth of the Philippine Islands was examined by a lower federal court in *Bradford v. Chase National Bank* (24 Fed. Supp. 28, 37 (1938); affirmed on other grounds, 105 F. 2d 1001 (C. C. A. 2, 1939); affirmed without opinion, 309 U. S. 632 (1939)). In this case, the Secretary of War as *amicus curiae* filed a suggestion, claiming immunity for the gov-

<sup>16</sup> The documents relating to the establishment of the government of the Commonwealth of the Philippines are collected in House Documents, No. 400, 74th Cong., 2d. Sess.

ernment of the Commonwealth of the Philippine Islands as a sovereign state. Judge Woolsey held as follows:

"If, however, I am wrong in so dealing with the suggestion of the War Department, I think that I must take judicial notice of the Philippine Independence Act—(Public 127, 73rd Congress), Title 48, United States Code, Sections 1231-1247, 48 U. S. C. A. §§ 1231-1247—providing for the creation of a sovereign state in the Philippine Islands, which though still subject in some respects, such, for example, as foreign relations, to the United States is similar—since the Proclamation of November 14, 1935, 49 Stat. 3481,—in its juridical status to the Government of Kelantan in the case of *Duff Development Company, Ltd., v. Government of Kelantan and the Crown Agents for the Colonies, Garnishees*, [1923] 1 Ch. 385, [1924] A. C. 797; and compare *Porto Rico v. Rosaly*, 227 U. S. 270, 273, 33 S. Ct. 352, 57 L. Ed. 507; *Kawananakoa v. Polyblank*, 205 U. S. 349, 353, 27 S. Ct. 526, 51 L. Ed. 834, and *Merritt v. Government of Philippine Islands*, 34 Phil. 311, 316.

"Thus the status of the Philippine Commonwealth as a sovereign is established without recourse to the suggestion of the Secretary of War."

It is no doubt true that the sovereignty of the Philippine Commonwealth is far from complete, by virtue of retention by the federal government of authority over foreign affairs, fiscal issues and judicial matters. Nevertheless, "all the property and rights" of the United States have now been granted to the Commonwealth government; and it would therefore appear that the Philippines are no longer to be regarded as a mere dependency of the federal government. Granted the Islands have not as yet attained complete independence, there has been enough of a transfer of sovereignty over to this new Commonwealth as to constitute it a nation separate and apart from the United States. In short, the Philippine Islands can no longer be regarded as merely a territory.

It is unnecessary to speculate here as to the precise status of the Commonwealth in international law, during the transition period. The essential fact remains that previous to the years 1938, 1939 and 1940,—within which years Philippine hemp was brought into this country by the petitioner,—the territorial status of the Islands had been modified. Local self-government had been granted, along with many of the attributes of national sovereignty. It is accordingly unsound to characterize the shipment of Philippine fibers from Manila to the United States as falling into any category other than that of importation. If state taxation can burden the commerce of a new nation, then the economic benefits of the transition period may be gravely jeopardized.

*c. Relation of Philippine Islands to State of Ohio.*

The problem in this case is to determine whether the Philippine Islands are foreign to the state of Ohio for the purpose of ascertaining the scope of the Constitutional limitation upon its power to tax, contained in Article I, Section 10, Clause 2, of the Constitution of the United States. The proposition that they are foreign to the state of Ohio is supported by the cases which hold that while for all national purposes embraced by the federal Constitution the states are one, united under the same sovereign authority and governed by the same laws, in all other respects they are necessarily foreign to and independent of each other. *Buckner v Finley & Van Lede*, 2 Pet. (27 U. S.) 586 (1829), *Bank of United States v. Daniel*, 12 Pet. (37 U. S.) 32, 54 (1838). Indeed, it was for this reason that control over both foreign and interstate commerce was vested in Congress by Article I, Section 8, Clause 3 of the Constitution. If, therefore, the states are foreign to each other as to all commerce not strictly local, the state of Ohio is *a fortiori* foreign to the Philippine Islands as a dependency

of the United States and as such peculiarly subject to its control.

An analysis of the terms of the provisions of Article I, Section 10, Clause 2, of the Constitution of the United States will show that, insofar as the state of Ohio is concerned, that part of the inventory in this case which was brought into the state from the Philippine Islands is not subject to taxation. Article I, Section 8, Clause 3 confers upon Congress the power to regulate two kinds of commerce: that which is foreign and that which is interstate. The course of business involved in this case was obviously neither local nor interstate, and therefore it must have been foreign commerce. This conclusion is confirmed by the long-continued exercise by Congress of control over commerce with the Philippines under the regulatory power conferred upon it by the commerce clause.

Moreover, the Congress of the United States has not consented to the taxation of the property involved in this case and without such consent the attempt to do so is palpably unconstitutional. If it be assumed for the purposes of argument that goods brought into the United States from the Philippine Islands are not imports so as to be entitled to immunity from state taxation, they immediately become subject thereto upon reaching port in a state of the United States and may be taxed by each state through which they pass to reach their destination. Yet it was to prevent such taxation that this constitutional provision was adopted. In *Brown v. Maryland*, *supra*, Chief Justice Marshall observed (pp. 438-439):

“From the vast inequality between the different States of the confederacy, as to commercial advantages, few subjects were viewed with deeper interest, or excited more irritation, than the manner in which the several States exercised, or seemed disposed to exercise, the power of laying duties on imports. From motives which were deemed sufficient by the statesmen of that day, the general power of taxation, indis-

pensably necessary as it was, and jealous as the States were of any encroachment on it, was so far abridged as to forbid them to touch imports or exports, with the single exception which has been noticed. Why are they restrained from imposing these duties? Plainly, because in the general opinion, the interest of all would be best promoted by placing that whole subject under the control of Congress. Whether the prohibition to 'lay imposts, or duties on imports or exports,' proceeded from an apprehension that the power might be so exercised as to disturb that equality among the States which was generally advantageous, or that harmony between them which it was desirable to preserve, or to maintain unimpaired our commercial connections with foreign nations, or to confer this source of revenue on the government of the Union, or whatever other motive might have induced the prohibition, it is plain that the object would be as completely defeated by a power to tax the article in the hands of the importer the instant it was landed, as by a power to tax it while entering the port. \* \* \*

### CONCLUSION.

It is, therefore, submitted that the petitioner in this case is the importer of the fibers in question; that the fibers brought into this country for manufacture and then sale were imports within the meaning of Article I, Section 10, Clause 2 of the Constitution of the United States; and that the fibers brought into the United States from the Philippine Islands are imports within the meaning of the same constitutional provision.

Taxation is a practical matter and not particularly concerned with the refinements of title. A constitutional immunity from state (property) taxation should not be made to depend upon "the witty diversities of the law of sales."<sup>17</sup>

<sup>17</sup> Holmes, J., in *Rearick v. Pennsylvania*, 203 U. S. 507, 512 (1906).

Petitioner respectfully prays therefore that this Court will accordingly reverse the judgment of the Supreme Court of Ohio and hold the fibers here involved constitutionally immune from state property taxation. .

Respectfully submitted,

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**APPENDIX.****Constitutional Provision.**

Article I, Section 10, Clause 2, of the Constitution of the United States:

"No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress."

**Statutory Provisions.**

Section 5371, General Code of Ohio:

"Personal property used in business shall be listed and assessed in the taxing district in which such business is carried on. If such business is carried on in more than one taxing district in the same county, the return shall set forth the amount of the property used therein which is situated in each taxing district in such county, and the value of the whole of the personal property used in business shall be apportioned to and assessed in each of such taxing districts in proportion to the value of the personal property situated therein. Domestic animals not used in business shall be listed and assessed in the taxing district where kept. Ships, vessels, boats and aircraft, and shares and interests therein, shall be listed and assessed in the taxing district in which the owner resides. All other taxable property shall be listed and assessed in the municipal corporation in which the owner resides, or, if the owner resides outside a municipal corporation, then in the county in which he resides, excepting as otherwise provided in this chapter. Whenever, under any provisions of this chapter, taxable property, required by this section to be listed and assessed in the taxing district or county in which the owner thereof resides, is required to be listed by a fiduciary, such property shall be listed and assessed by such fiduciary in the taxing

district or county in which such fiduciary resides, or, in the case of joint fiduciaries, in which either such fiduciary resides; but such property belonging to the estate of a deceased resident of this state shall be listed and assessed in the taxing district or county in which he resided at the time of his death regardless of the residence of his executors, administrators or personal representatives, and such property belonging to a ward, minor, insane person, or beneficiary of a trust, residing in this state, title, custody or possession of which is vested in a non-resident fiduciary, shall be listed and assessed in the taxing district or county in which such ward, minor, insane person or beneficiary resides."

Section 5378, General Code of Ohio:

"A corporation having taxable property required to be listed in more than one county shall make a combined return to the commission, listing therein all its taxable property in this state, conformably to all the provisions of this chapter, but it shall not assign its property of the kinds mentioned in section 5328-1 of the General Code, to any particular taxing district or districts, or county or counties. The commission shall assess the personal property of such corporation in the several taxing districts in which it is required by this chapter to be assessed, and shall issue assessment certificates therefor to the proper county auditors at the time and in the manner required by this chapter. All other property of such corporation, required to be so listed, shall be entered on the intangible property tax list in the office of the auditor of state and duplicate thereof in the office of the treasurer of state and taxed under section 5638-1 of the General Code. The commission shall assess all such other property of each such corporation and, on or before the third Monday of May, annually, shall certify the total value or amount of each kind or class thereof, to the auditor of state who shall enter same on the intangible property tax list in his office in the manner provided in chapter four of this title. Excepting as otherwise expressly provided in this section, all

the provisions of this chapter shall apply to and govern such corporation, its proper officers and representatives, the commission and the county auditor with respect to all proceedings in the assessment of the property of such corporation."